TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 49

NORMAN C. BERNHARDT, PETITIONER,

vs.

POLYGRAPHIC COMPANY OF AMERICA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 16, 1955

CERTIORARI GRANTED MAY 31, 1955

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in U.S.C.A. for the Second Circuit	1	1
Appendix to Appellant's Brief	3	1
Docket entries	3	1
Petition for removal	4	1
Defendant's answer and counterclaim	12	10
Plaintiff's answer to counterclaim	15	13
Motion for stay of proceedings	16	13
American Arbitration Association Demand (omitted in printing)	18	
Petition for temporary injunction (omitted in printing)	20	
Opinion, Gibson, J.	21	15
Notice of appeal	24	18
Docket entries	24a	18
Opinion, Frank, J.	25	19
Judgment	32	25
Affidavit in support of motion to recall mandate and stay, etc. (omitted in printing)	34	
Affidavit in opposition to motion to recall mandate and stay, etc. (omitted in printing)	39	
Decision on motion to recall mandate, and stay, etc. (omitted in printing)	53	
Clerk's certificate (omitted in printing)	55	
Order allowing certiorari	57	26

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUG. 10, 1955

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[fols. 1-3]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

Appendix to Appellant's Brief

DOCKET ENTRIES

March 5. Filed Petition for Removal from Bennington County Court, State of Vermont and removal costs bond.

March 10. Filed Defendant's Answer and Counterclaim, Notice of Apearance of Guy Page, Jr., Esq., and McNamara and Larrow for defendant and notice under Rule 5.

April 23. Filed Plaintiff's Answer to Defendant's Counterclaim, Certificate and Notice under Rule 5.

April 22. Filed notice to take Deposition and Certificate.

May 6. Filed Motion for Stay of Proceedings.

June 22. Petition for temporary injunction.

June 22. Hearing on Motion for Stay of Proceedings, M. W. Ehrich, Jr., Esq., and E. V. Clark, Esq., appeared for plaintiff. J. A. McNamara, Esq., and Guy Page, Jr., Esq., appeared for defendant, decision reserved.

July 9. Filed Findings of Fact, Conclusion of Law, and order denying defendant's motion to stay and denying plaintiff's petition for temporary injunction; mailed copy to attorneys.

July 20. Filed notice of Examination by plaintiff before trial and certificate of service.

July 28. Filed notice of appeal by defendant. Mailed copy to M. W. Ehrich, Jr., Esq., and E. V. Clark, Esq.

[fol. 4] IN UNITED STATES DISTRICT COURT

PETITION FOR REMOVAL—Filed March 5, 1954

To the United States District Court for the District of Vermont:

Petitioner, Polygraphic Company of America, Inc., respectfully shows:

(1) Petitioner is the defendant in the above entitled action.

(2) The above entitled action was commenced in the

County Court within and for the County of Bennington, State of Vermont, and is now pending in that court. Process was served on the petitioner on the Fifteenth day of February, 1954. A copy of the plaintiff's complaint setting forth the claim for relief upon which the action is based was first received by the petitioner upon the said Fifteenth day of February, 1954.

(3) The action is a civil action for breach of contract for employment seeking damages for discharge of the plaintiff by the defendant, and the United States District Court for the District of Vermont has jurisdiction by reason of the diversity of citizenship of the parties.

(4) The plaintiff is and was at the time the action was commenced a citizen of the State of Vermont. The defendant is and was at the time the action was commenced, a corporation, incorporated and existing under and by virtue of the laws of the State of New York, and a citizen of that State. The matter in controversy exceeds, exclusive of interest and costs the sum of Three Thousand Dollars ($3,000).

(5) Defendant Polygraphic Company of America, Inc. files herewith a bond, with good and sufficient sureties, for paying all costs and disbursements incurred by reason of these removal proceedings, if this court shall hold that the [fol. 5] action was not removable or improperly removed thereto, as provided by the statutes of the United States.

Your petitioner therefore prays for removal of the above entitled cause from the state court to this court.

Know all men by these presents, that Polygraphic Company of America, Inc., the above named defendant, as principal, and Guy Page, Jr., as surety, are held and firmly bound to Norman C. Bernhardt, plaintiff, in the above-entitled cause; his heirs and assigns in the sum of Five Hundred Dollars ($500.) lawful money of the United States of America, for the payment of which; well and truly to be made, we, and each of us, bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

The condition of this obligation is such that:

Whereas; Polygraphic Company of America, Inc., has applied by petition to the United States District Court for the District of Vermont for the removal of a certain cause

pending in the county court within and for the County of Bennington, State of Vermont, wherein Norman C. Bernhardt is plaintiff and Polygraphic Company of America, Inc., is defendant, to the United States District Court for the District of Vermont, for further proceedings on the grounds in said petition set forth:

Now, therefore, if petitioner Polygraphic Company of America, Inc., shall pay all costs and disbursements incurred by reason of the removal proceedings if it should be determined that the cause was not removable or was improperly removed to the district court, then this obligation shall be void; otherwise it shall remain in full force and effect.

In witness whereof, we, the principal and surety, have caused this instrument to be executed this 5th day of March, 1954.

Polygraphic Corporation of America, Inc., by Robert M. Werblow, President; Guy Page, Jr., Surety.

[fol. 6] STATE OF VERMONT,
Bennington County, ss:

To Any Sheriff or Constable in the State; or to an Indifferent Person, Greeting:

By the Authority of the State of Vermont, You are hereby commanded to attach the goods, chattels or estate of Polygraphic Company of America, Inc., a corporation created, organized and existing under and by virtue of the laws of the State of New York with an office and principal place of business in Bennington in said County to the value of Thirty-one Thousand Dollars ($31,000) and it notify thereof according to law; and also notify it to appear before the Bennington County Court at said Bennington within and for the County of Bennington and also to notify it to cause its appearance herein, to be entered with the clerk of said Court, on or before the expiration of forty-two days from the date hereof, then and there in said Court to answer to Norman C. Bernhardt of said Bennington.

1. In a Plea of contract that at Bennington in said County on the 19th day of July, 1952, said defendant, hereinafter called the company, being desirous of engaging said plaintiff as superintendent for its lithographic plant at said Ben-

nington, did then and there mutually agree with said plaintiff in words and figures as follows:

"Agreement made and entered into this 19th day of July, 1952 by and between Polygraphic Company of America, Incorporated, a corporation duly organized and existing under and by virtue (sic) of the laws of the State of New York and having its principal office at 310 East 45th Street, Borough of Manhattan, City and State of New York, hereinafter called the 'Employer', and

"Norman C. Bernhardt, residing at 12 Forbes Road, Tuckahoe, County of Westchester, State of New York, hereinafter referred to as 'Employee',

"Witnesseth:

"Whereas, Employer is engaged in the lithographic and [fol. 7] printing business in all of its branches and maintains a lithographic plant in North Bennington, Vermont; and

"Whereas, Employee has been engaged and has had long experience in said business; and

"Whereas, Employee is anxious and willing to be employed by Employer, and Employer is willing and desirous of employing Employee, all upon the terms, covenants and conditions hereinafter set forth.

"Now, Therefore, for and in consideration of the mutual promises and agreements hereinafter set forth, and other good and valuable considerations, receipt whereof is hereby acknowledged, it is agreed as follows:

"First: Employer does hereby employ, engage and hire Employee as its superintendent of its lithographic plant at North Bennington, Vermont, and Employee does hereby accept and agree to such hiring, engagement and employment. Subject to the general supervision and pursuant to the orders, advice and direction of the Employer, Employee shall have charge of and be responsible for the operation of said lithographic plant in North Bennington, shall perform such other duties as are customarily performed by one holding such position in other, same of similar businesses or enterprises as that engaged in by the Employer, and shall also additionally render such other and unrelated services and duties as may be assigned to him from time to time by Employer.

"Second: Employee agrees that he will at all times faithfully, industriously and to the best of his ability, experience and talents perform all of the duties that may be required of and from him pursuant to the express and implicit terms hereof, to the reasonable satisfaction of Employer. Such duties shall be rendered at North Bennington, Vermont and at such other place or places as Employer shall in good faith require or as the interests, needs, business and opportunities of Employer shall require or make advisable.

"It is understood and agreed and is a condition of this agreement that on or before the beginning of the term of this agreement, Employee shall move his residence from Tuckahoe, New York and shall take up residence in the immediate area of North Bennington, Vermont with his family.

"Third: The term of this agreement shall be for a period of three years commencing August 1, 1952 and terminating July 31, 1955, subject, however, to prior termination as is hereinafter provided for.

[fol. 8] "Fourth: Employer shall pay Employee and Employee agrees to accept from Employer, in full payment for Employee's services hereunder, compensation at the rate of $15,000.00 per annum, payable twice a month on the 15th and 1st days of each month during which this agreement shall be in force; the compensation for the period commencing August 1, 1952 through August 15, 1952 shall be payable on August 15, 1952.

"In addition to the foregoing, Employer agrees that it will reimburse Employee for any and all necessary, customary and usual expenses incurred by him while traveling for and on behalf of the Employer pursuant to Employer's directions.

"Fifth: Notwithstanding anything in this agreement to the contrary, Employer is hereby given the option to terminate this agreement in the event that Employee shall, during the term hereof, become permanently disabled as the term permanently disabled is hereinafter fixed and defined. Such option shall be exercised by Employer giving notice to Employee by registered mail, addressed to him in care of Employer at North Bennington, Vermont, or at such other address as Employee shall designate in writing sent to Em-

ployer by registered mail, return receipt requested, postage prepaid at 310 East 45th Street, New York, New York, of its intention to terminate this agreement on the last day of the month during which such notice is mailed as aforesaid and thereupon, upon the giving of such notice, this agreement and the term hereof shall cease and come to an end upon the last day of the month in which the said notice is so mailed, with the same force and effect as if such last day of the month were the date originally herein set forth as the termination date hereof.

"For the purposes of this agreement Employee shall be deemed to have become permanently disabled, if, during any year of the term hereof, because of ill health, physical or mental disability or for other causes beyond his control he shall have been continuously unable, unwilling or failed to have performed his duties hereunder for 90 consecutive days, or if, during any year of the term hereof, he shall have been unable, unwilling or have failed to perform his duties for a total period of 150 days, be such days consecutive and successive or not. For the purposes hereof the term 'any year of the term hereof' is defined to mean any 12 calendar month period commencing August 1 and terminating July 31 of the following year during the term hereof.

"Sixth: Anything herein contained to the contrary notwithstanding, in the event that Employer shall discontinue operating its lithographic plant at North Bennington, Vermont, then this agreement shall cease and terminate as of the last day of the month in which Employer ceases operations at the said plant with the same force and effect as if [fol. 9] said last day of the month were originally set forth as the termination date hereof.

"Seventh: Employer shall devote all of his time, attention, knowledge and skill solely and exclusively to the business and interest of Employer, and Employer shall be entitled to all of the benefits, emoluments, profits or other issues arising from or incident to any and all work, services and advice of Employee, and Employee expressly agrees that he will not, during the term hereof, be interested, directly or indirectly, in any form, fashion or manner, as partner, ofice (sic), director, stockholder, advisor, employee or in any other form or capacity in any other busi-

ness similar to Employer's business or any allied trade; provided, however, that nothing herein contained shall be deemed to prevent or limit the right of Employee to invest (sic) any of his surplus funds in the capital stock or other securities of any corporation whose stock or securities are publicly owned or are regularly traded on any public exchange, nor shall anything herein contained be deemed to prevent Employee from investing or limit Employee's right to invest his surplus funds in real estate.

"Eighth: Employee further specifically agrees that he will not at any time, in any fashion, form or manner, either directly or indirectly, divulge, disclose or communicate to any person, firm or corporation in any manner whatsoever any information of any kind, nature or description concerning any matters affecting or relating to the business of Employer, including without limiting the generality of the foregoing, any of its customers, the prices it obtains or has obtained or at which it sells or has sold its products, or any other information of, about or concerning the business of Employer, its manner of operation, its plans, processes or other data of any kind, nature or description without regard to whether any or all of the foregoing matters would be deemed confidential, material or important, the parties hereto stipulating that as between them, the same are important, material and confidential and gravely affect the effective and successful conduct of the business of the Employer, and its goodwill, and that any breach of the terms of this paragraph are a material breach hereof.

"Ninth: It is expressly understood and agreed that Employee shall not be entitled to any additional compensation by reason of any service which he may perform as a member of any managing committee of Employer, or in the event that he shall at any time be elected an officer or director of Employer.

"Tenth: Anything here contained to the contrary, notwithstanding, it is expressly understood and agreed that [fol. 10] Employee shall not have the right to make any contracts or commitments for or on behalf of Employer without the written consent of Employer first had and obtained.

"Eleventh: The parties hereto do agree that any differ-

ences, claims or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere.

"Twelfth: This agreement contains the sole and entire agreement between the parties and shall, as of the effective date hereof, supersede any and all other agreements between the parties. The parties acknowledge and agree that neither of them has made any representation with respect to the subject matter of this agreement or any representations inducing the execution and delivery hereof except such representations as are specifically set forth herein and each of the parties hereto acknowledges that he or it has relied on his or its own judgment in entering into the same. The parties hereto further acknowledge that any statements or representations that may have heretofore been made by either of them to the other are void and of no effect and that neither of them has relied thereon in connection with his or its dealings with the other.

"Thirteenth: The parties hereto do further agree that no waiver or modification of this agreement or of any covenant, condition or limitation herein contained shall be valid unless in writing and duly executed by the party to be charged therewith and that no evidence of any waiver or modification shall be offered or received in evidence in any proceeding, arbitration or litigations between either of the parties hereto arising out or affecting this agreement, or the rights or obligations of any party hereunder, unless such waiver or modification is in writing, duly executed as aforesaid, and the parties further agree that the provisions of this Paragraph Thirteenth hereof may not be waived except as herein set forth.

"Fourteenth: The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance [fol. 11] with and under and pursuant to the laws of the State of New York and that in any action special proceeding or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted.

"Fifteenth: This agreement shall be binding upon and inure to the benefit of the respective parties hereto and their executors, administrators, heirs, personal representatives, successors and assigns.

"In witness whereof the parties hereto have duly executed this agreement the 31st day of July, 1952.

Polygraphic Company of America, Inc., by (S.) R. W. Werblow, President. (S.) Norman C. Bernhardt, (T.) Norman C. Bernhardt"

2. Pursuant to the terms of said contract plaintiff entered into the employment of said company on August 1, 1952, and thereafter fully performed and fulfilled all terms, promises and *con*-conditions on his part to be performed and fulfilled.

3. Yet said company, not regarding said terms, promises, conditions on its part to be performed and fulfilled and in breach thereof at said Bennington, on the 22nd day of October, 1953, did then and there discharge said plaintiff from its employment without cause and thereafter ceased and refused to pay said plaintiff his wages and compensation pursuant to said contract.

4. That as a result of said breach of contract on the part of the said company said plaintiff has been required to seek other employment to his great expense and damage and said plaintiff as a result of said breach has suffered and will continue to suffer great loss of wages and compensation during the term of said contract.

5. All to the damage of the said plaintiff in the amount

of Thirty Thousand Dollars ($30,000) for the recovery of which with just costs plaintiff brings suit.

[fol. 12] Fail not, but service and return make within twenty-one days from the date hereof.

Dated at Bennington in the County of Bennington the 10th day February, 1954.

(S.) George H. Plumb, Bennington County Clerk.

s/ Eugene V. Clark recognized to the Defendant in the sum of Fifty Dollars ($50) and to each of the above named Trustees in the sum of Fifty ($50) Dollars, as surety for the costs of prosecution, as the law directs.

Before me, (S.) George H. Plumb, Bennington County Clerk.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER AND COUNTERCLAIM—Filed March 10, 1954

Now comes Polygraphic Company of America, Inc., by its attorneys, Guy Page, Jr. and McNamara and Larrow, and by way of answer to plaintiff's complaint in said action says:

1. Defendant admits the allegations contained in Paragraph numbered "1" of the complaint.

2. Defendant admits that the plaintiff entered into its employment August 1, 1952, but denies each and every other allegation contained in Paragraph numbered "2" of the complaint.

3. Defendant denies each and every allegation contained in the Paragraph numbered "3" of the complaint, and says that it discharged plaintiff on the 22nd day of October, 1953, for good cause, viz., that the plaintiff had by his negligent and unskillful performance of duties destroyed the defendant's product in the amount of $27,000.00, and that plaintiff had been secretly for some time prior thereto engaged in an effort to induce defendant's employees to [fol. 13] leave defendant's employ and enter the employment of a competing enterprise under plaintiff's management.

4. Defendant denies each and every allegation contained in the Paragraphs numbered "4" and "5" of the complaint.

5. And for a further defense the defendant says that the plaintiff has not duly performed all the conditions precedent of said contract on his part, but, on the contrary, although said contract contained a provision, of which the following is a copy:

> "Eleventh: The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere."

And the defendant says that plaintiff has refused to submit to arbitration the subject matter of the present controversy, and that in breach of the aforesaid clause he has brought suit in a court of law, to wit, the county court within and for the County of Bennington, State of Vermont. Defendant shows that the agreement between plaintiff and defendant contain a provision, of which the following is a copy:

> "Fourteenth: The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suit and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the state of New York and that in any action special proceeding or other proceeding that may be

brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the juris- [fol: 14] diction in which any action or special proceeding may be instituted."

Defendant says that by virtue of the aforesaid clause the law applicable to the rights of the parties to this proceeding is the law of the State of New York, and not the law of the State of Vermont; and that by virtue of the said law of the State of New York plaintiff is not entitled to maintain this action so long as he continues to be in breach of said provision numbered "Eleventh" in said agreement.

6. And for a further defense defendant says that plaintiff has breached the agreement upon which he seeks recovery, in that he has failed to perform the article "Eleventh" of the said agreement, as set forth in the Paragraph numbered "5" of this answer, and that by virtue of the article numbered "Fourteenth" of the said agreement, as set forth in the Paragraph "5" of this answer, the effect of the plaintiff's said breach of his undertaking in said article "Eleventh" of the said agreement, is to be determined by the law of the State of New York; and that by virtue of the said law of the State of New York, the plaintiff's said the said breach is so far material to the object of the said breach is so far material to the object of the said agreement that the said breach in itself must defeat the plaintiff's recovery in this action.

Defendant's Counterclaim

Defendant counterclaims and shows that at Bennington, in the County of Bennington and State of Vermont, on divers days between the first day of August, 1952 and the 22nd day of October, 1953, plaintiff by reason of the unskilled performance of his duties did carelessly and negligently destroy, or allow to be destroyed, products of the defendant having an aggregate value of $27,000.00, thereby damaging the defendant in the amount of $27,000.00 for which, with just costs, defendant asks judgment.

[fol. 15] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ANSWER TO DEFENDANT'S COUNTERCLAIM—Filed April 23, 1954

Now comes Norman C. Bernhardt, by his attorneys, Manfred W. Ehrich, Jr., and Eugene V. Clark and answering the defendant's counterclaim in the above entitled cause.

Denies each and every allegation contained therein.

Wherefore the plaintiff, Norman C. Bernhardt, asks judgment with his costs.

Norman C. Bernhardt vs. Polygraphic Company of America, Inc., Civil Action —, File No. —.

[fol. 16] IN UNITED STATES DISTRICT COURT

MOTION FOR STAY OF PROCEEDINGS—Filed May 6, 1954

Comes now Polygraphic Company of America, Inc., by its attorneys, Guy Page, Jr., and McNamara and Larrow, and shows that:

1. At the City of New York in the State of New York on July 31, 1952, plaintiff and defendant entered into a contract of employment, which contained articles as follows:

"Eleventh: The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere.

[fol. 17] "Fourteenth: The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of New York and that in any action, special proceeding or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted."

On October 22, 1953, defendant discharged plaintiff asserting as a cause, among others, that plaintiff had negligently permitted the destruction of defendant's property to the value of Twenty-seven thousand ($27,000.00) dollars.

2. Under the law of the State of New York the plaintiff cannot revoke his agreement to submit to arbitration disputes between the parties to the contract of employment arising between them out of that contract, or connected therewith; but, on the contrary defendant has a right to secure the appointment of arbitrators and to cause the award of such arbitration to be entered as a judgment in bar of any action arising out of matters submitted to such arbitrators.

3. The law of New York governs, to the exclusion of the law of Vermont; the determination of the issue as to whether plaintiff can revoke his agreement to arbitrate, by reason of the fact that the contract was entered into in the State of New York.

4. The law of New York governs, to the exclusion of the law of Vermont, the determination of the issue as to whether plaintiff can revoke his agreement to arbitrate, by reason of the agreement of the parties.

5. On May 3, 1954, defendant served on plaintiff a demand for arbitration of all the controversies between the parties which are the subject matter of this civil action; by reason of such service, and proceedings to be had pursuant thereto under the rules of the American Arbitration Association and the laws of the State of New York, said service will result in the appointment of arbitrators; de-

[fols. 18-20] termination by them of all of the controversies which are the subject matter of the civil action, and announcement of an award disposing of all such controversies. Said award when made and duly entered in a court of the State of New York will be a judgment entitled to full faith and credit, or if said award is offered as a defense in this civil action, it will dispose of all the issues in this civil action. A copy of said demand for arbitration is attached to this motion as an exhibit thereto.

Wherefore, the defandant prays this civil action and all proceedings therein be stayed pending appointment of arbitrators and determination by such arbitrators of the controversies which are the subject matter of this action.

AMERICAN ARBITRATION ASSOCIATION. DEMAND FOR ARBITRATION.—(omitted in printing)

[fol. 21] IN UNITED STATES DISTRICT COURT

OPINION—July 8, 1954

GIBSON, J.

On February 15, 1954, the plaintiff, a citizen of Vermont, instituted this civil action for breach of an employment contract in the county court within and for the County of Bennington, Vermont. On March 5, 1954, the defendant, a corporate citizen of New York, petitioned for the removal of the county court action to this court under the provisions of 28 U.S.C.A. 1441 et seq. On March 10, 1954, the defendant filed its answer to the complaint, joining therewith a counterclaim against the defendant.

On May 6, 1954, the defendant moved for a stay of the proceedings in this court on the grounds that the employment contract here in issue contained a mandatory, irrevocable agreement providing for arbitration of any disputes which might arise out of the contract. The particular contractual provisions pertinent here are as follows:

"Eleventh: The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted

by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere."

"Fourteenth: The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance [fol. 22] with and under and pursuant to the laws of the State of New York and that in any action special proceeding or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted."

It is the defendant's contention that it is entitled to the stay it seeks on three independent grounds:

1. Under the authority of the Federal Arbitration Act, so-called, as set forth in 9 U. S. C. A.;

2. That the parties have validly contracted to adjust contractual disputes by arbitration;

3. That a Vermont court would, under like circumstances, stay the present action.

The cause was argued at Brattleboro, Vermont, on June 22, 1954, at which time the plaintiff petitioned for a temporary injunction to prevent the defendant from continuing the arbitration proceedings which it had instituted on or about May 3, 1954.

Conclusion of Law

It might well be said that all three of the defendant's contentions are centered in one issue, i.e.: what would a state court of this jurisdiction do were the instant motion before

it?. Passing over the questions of whether this employment contract is a contract evidencing a transaction involving commerce or if this is a suit or proceeding brought in a District Court of the United States, we must remember that a United States District Court is bound by the substantive law of the state within the boundaries of which it sits. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. In a case based solely on diversity of citizenship, the substantial result of litigation in a Federal Court should not differ from that in a state court. *Guaranty* [fol. 23] *Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079; *Angel* v. *Bullington*, 330 U. S. 183, 67 S. Ct. 650, 91 L. Ed. 832. It is therefore obvious that this Court must act upon the stay motion so as to reach the same legal result as would a state court of this jurisdiction.

There is no statutory law governing arbitration in Vermont; common law rules must, therefore, necessarily apply. The common law rule is that an agreement to submit an issue to arbitration is not binding and is revocable at any time before an award is actually made by arbitrators. *Mead's Admx. v. Owen*, 83 Vt. 132, 135; *Sartwell* v. *Soules, et al.*, 72 Vt. 270, 277. This seems also to be the general rule to be applied in the absence of a controlling statute. *Shafer* v. *Metro-Goldwyn-Mayer Dist. Corp.*, 36 Ohio App. 31, 172 N.E. 689, 693; 6 C.J.S. Arbitration and Award 33(a).

In accordance with the law of Vermont, it is ordered that the defendant's motion for a stay of these proceedings be denied. The temporary injunction sought by the plaintiff is a matter addressed largely to the discretion of this Court. *Meccano, Ltd.* v. *John Wanamaker*, 253 U. S. 136, 40 S. Ct. 463, 64 L. Ed. 822. The requisite need for this injunction has not been shown convincingly and the petition therefor is denied. *National Commodities Co.* v. *Kiret*, C.C.A. 2, 296 F. 664.

Let entry be made accordingly.

Ernest W. Gibson, U. S. District Judge.

Dated at Brattleboro, Vermont, this eighth day of July, 1954.

Endorsed: Filed July 9, 1954.

Arnold A. Murray, Deputy Clerk.

[fol. 24] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 28, 1954

Notice is hereby given that Polygraphic Company of America, Inc., defendant above named, hereby appeals to the United States Court of Appeals for the 2nd Circuit from an order of the United States District Court for the District of Vermont denying defendant's motion for a stay of proceedings entered in this action on July 9, 1954.

Dated at Burlington, Vermont this 27th day of July, 1954.

(S.) McNamara & Larrow, Guy Page, Jr., Attorneys for Defendant, Polygraphic Company of America, Inc., 209 College Street, Burlington, Vermont.

[File endorsement omitted]

[fol. 24a] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

DOCKET ENTRIES

I, A. Daniel Fusaro, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the docket entries in the above entitled case in this Court are as follows:

September 7, 1954. Filed tw. record (original papers of Dist. Ct.)
October 6, 1954. Filed 24 copies, appendix-appellant
October 6, 1954. Filed brief, appellant
October 27, 1954. Filed order extending time to Nov. 9, 1954
November 8, 1954. Filed brief, appellee
November 20, 1954. Filed brief, Appellant, reply
January 19, 1955. Order reversed, Frank, C.J.
January 19, 1955. Filed judgment
Febraary 4, 1955. Filed bill of costs
February 4, 1955. Issued mandate

1954

March 4, 1955. Filed motion for temporary stay pending determination of motion to recall mandate, etc.

March 11, 1955. Filed motion papers (endorsed) & order recalling mandate and staying arbitration proceedings pending application for writ of certiorari

March 17, 1955. Received recalled mandate

April 11, 1955. Certified appendix & proceedings to EVC

April 18, 1955. Filed copy of notice of filing petition for certiorari

June 6, 1955. Filed certified copy of order of Supreme Court granting petition for certiorari

June 6, 1955. Reissued recalled mandate (inadvertently issued)

June 30, 1955. Received recalled mandate

Dated: July 25, 1955.

A. Daniel Fusaro, Clerk, United States Court of Appeals, Second Circuit. (Seal.)

[fol. 25] In United States Court of Appeals for the Second Circuit, October Term, 1954

No. 114

Argued December 14, 15, 1954.

Docket No. 23196

Norman C. Bernhardt, Appellee

v.

Polygraphic Company of America, Inc., Appellant

Before: Swan, Frank and Hincks, Circuit Judges.

Appeal from an order of the United States District Court for the District of Vermont, entered by Judge Gibson. Reversed.

Manfred W. Ehrich, Jr. and Eugene V. Clark, Bennington, Vermont, for appellee;

McNamara & Larrow, Guy M. Page and Guy M. Page, Jr., Burlington, Vermont, for appellant.

Defendant, a New York corporation, made a written agreement in New York with plaintiff, then a resident of that State. The agreement provided for the employment of plaintiff as the superintendent of defendant's lithograph plant in Vermont. It also provided:

[fol. 26] "Subject to the general supervision and pursuant to the orders, advice and direction of the Employer, Employee shall have charge of and be responsible for the operation of said lithographic plant in North Bennington, shall perform such other duties as are customarily performed by one holding such position in other, same or similar businesses or enterprises as that engaged in by the Employer, and shall also additionally render such other and unrelated services and duties as may be assigned to him from time to time by Employer. . . .

"Employer shall pay Employee and Employee agrees to accept from Employer, in full payment for Employee's services hereunder, compensation at the rate of $15,000.00 per annum, payable twice a month on the 15th and 1st days of each month during which this agreement shall be in force; the compensation for the period commencing August 1, 1952 through August 15, 1952 shall be payable on August 15, 1952. In addition to the foregoing, Employer agrees that it will reimburse Employee for any and all necessary, customary and usual expenses incurred by him while traveling for and on behalf of the Employer pursuant to Employer's directions. . . .

"It is expressly understood and agreed that Employee shall not be entitled to any additional compensation by reason of any service which he may perform as a member of any managing committee of Employer, or in the event that he shall at any time be elected an officer or director of Employer. . . .

"The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbi-

tration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere. . . .

"The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of New York and that in any action special proceeding or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be [fol. 27] applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted."

Plaintiff, having become a resident of Vermont, brought this action in the Vermont state court. His complaint set forth the agreement, alleged that defendant had wrongfully discharged plaintiff, and asked damages. Defendant, having removed the suit to the court below, filed its answer, including a counterclaim. Defendant then made a motion for a stay; it alleged that it had served on plaintiff a demand for arbitration, and prayed that plaintiff's suit be stayed "pending appointment of arbitrators and determination by such arbitrators of the controversies which are the subject matter of this action."

The district judge denied the stay on the ground that, under Vermont "law," an agreement to arbitrate "is not binding and is revocable at any time before an award is actually made by arbitrators," and that, under Erie R. Co.

v. Tompkins, 304 U. S. 64, and related cases, Vermont "law" controlled. Defendant appealed.

The Federal Arbitration Act, 9 U.S.C. Secs. 1, 2 and 3, reads as follows:

"Sec. 1. *Maritime transactions* and *commerce* defined; exceptions to operation of title:

"'Maritime transactions,' as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations; or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or foreign nation, but nothing herein contained shall apply to contracts of employment in of seamen rail- [fol. 28] road employees, or any other class of workers engaged in foreign or interstate commerce.

"Sec. 2. Validity, Irrevocability, and enforcement of agreements to arbitrate.

"'A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"Sec. 3. Stay of proceedings where issue therein referable to arbitration.

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such *suit* is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

[fol. 29] FRANK, Circuit Judge:

1. We think that a stay, pursuant to Section 3 of the Federal Arbitration Act, 9 U. S. C. Sec. 3, is not "substantive" within the meaning of Erie R. Co. v. Tompkins, 304 U. S. 64, and Guaranty Trust Company v. York, 326 U. S. 99. We so held, per Judge Learned Hand, in Murray Oil Products Company v. Mitsui & Company, 146 F. (2d) 381, 383 (C. A. 2), where we said: "Arbitration is merely a form of trial, to be adopted in the action itself, in place of a trial at common law: it is like a reference to a master, or an 'advisory trial' under Federal Rules of Civil Procedure, Rule 39(c)."

2. Section 3 applies whether or not the agreement is of a kind covered by Sec. 2, i.e., for purposes of Sec. 3, the agreement need not involve a maritime transaction or interstate or foreign commerce. The power to enact Sec. 3 derives from Article III, Section 2 of the Constitution. See, e. g., Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 70 F. (2d) 297, 298 (C. A. 2) aff'd 293 U. S. 449; Agostini Bros. Bldg. Corp. v. United States, 142 F. (2d) 854 (C. A. 4).

3. Plaintiff argues that Section 3 deals with a suit "brought in any court of the United States" and therefore not with a removed suit. We cannot agree. Murray Oil Products Co. v. Mitsui & Co., supra, was a removed suit; see also Parry v. Bache, 125 F. (2d) 493, 495 (C. A. 5).

4. Section 1 of the Act provides that "nothing herein con-

tained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."[1] We need not in this [fols. 30-31] case decide whether this clause is restricted in its application to those sections of the Act relating to interstate and foreign commerce or whether it applies to all sections, including Section 3. For assuming, arguendo, that the second interpretation is correct, we think the clause irrelevant here. The words "any other class of workers," read in connection with the immediately preceding words, show an intention to exclude contracts of employment of a "class" of "workers" like "seamen" or "railroad employees."[2] Plaintiff was not hired as a "worker" but as a plant superintendent, at a salary of $15,000 a year, with managerial duties fundamentally different from those of "workers."[3]

The California arbitration statute excludes from its scope

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[1] For a variety of conclusions as to the meaning and application of this clause, see, e. g., Donahue v. Susquehanna Collieries Co., 138 F. (2d) 3 (C. A. 3); Watkins v. Hudson Coal Co., 151 F. (2d) 311 (C. A. 3); Amalgamated Association v. Greyhound Lines, 192 F. (2d) 310 (C. A. 3); Pennsylvania Greyhound Lines v. Amalgamated Association, 193 F. (2d) 327 (C. A. 3); Tenney Engineering Co. v. United Electrical R. & M. Workers, 207 F. (2d) 450 (C. A. 3); Shirley-Herman Co., Inc. v. International Hod-Carriers, 182 F. (2d) 806, 809 (C. A. 2); Agostini Bros. Building Corp. v. United States, 142 F. (2d) 854 (C. A. 4); International Union v. Colonial Hardware Flooring Co., 168 F. (2d) 33 (C. A. 4); Gatliff Coal Co. v. Cox, 142 F. (2d) 876 (C. A. 6); Lewittes & Sons v. United Furniture Workers, 95 F. Supp. 851 (D. C., S. D. N. Y.); Ludlow Mfg. & Sales Co. v. Textile Workers Union, 108 F. Supp. 45 (D. C. Del.)

[2] See discussion of the background of this clause in Tenney Engineering Co. v. United Electrical R. & M. Workers, 207 F. (2d) 450, 452-453 (C. A. 3).

[3] Note, inter alia, the provision contemplating that plaintiff might perform services "as a member of the management committee" and might be "elected an officer or director."

"contracts pertaining to labor." The California courts have held that this exclusion does not cover a contract with a sales manager, hired at a salary of $100 per week; Kerr v. Nelson, 59 Pac. (2d) 821; or one with a motion-picture actor to be paid $1,000 per week; Universal Pictures Corp. v. Superior Court, 50 Pac. (2d) 500. See also Levy v. Superior Court, 104 Pac. (2d) 770, 773. We think these decisions most persuasive.

Reversed.

[fol. 32] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NORMAN C. BERNHARDT, Plaintiff-Appellee,

v.

POLYGRAPHIC CO. OF AMERICA, INC., Defendant-Appellant

JUDGMENT—January 19, 1955

Appeal from the United States District Court for the District of Vermont

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this Court; with costs to the appellant.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. Daniel Fusaro, Clerk.

[fols. 33-54] [File endorsment omitted.]

[fols. 55-56] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 57] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 731

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed May 31, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.